Kysor/Cadillac, an Operating Division of Kysor Industrial Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 545. Case 7–CA–30283

May 18, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On March 14, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief[1] and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

In so doing, we find that the violations arose from the Respondent's conduct in 1990. The dissent misapprehends the record evidence in finding that the Respondent's discharge of Mark Sessler and Shad Smith was sanctioned by their having signed applicant consent forms in 1986. These forms, as we show below, were unrelated to the policy pursuant to which Sessler and Smith were discharged.

On January 10, 1990, Kevin Lattimer was involved in a worksite accident. The Respondent required Lattimer to submit to a drug test. Lattimer did so and was found drug free. Lattimer reported the incident to Union Steward Michael Gamble who questioned Plant Manager Larry Payne about Lattimer's drug test. Payne informed Gamble that ''it was company policy as of January 1st, 1990.'' Shortly afterwards, on February 12, Gamble attended a forum on drug testing with the Respondent's managers. Gamble asked how the Respondent ''could post or impose a drug policy'' without negotiating. Payne was asked ''if he had posted this drug-free work place policy.'' Payne responded that he had not. The next day, on February 13, the Respondent posted a notice dated February 8 announcing its ''drug-free workplace policy.'' The policy prohibited drugs and alcohol in the workplace and working under their influence. The notice stated:

> The Company reserves the right to require any employee who it believes to be in violation of the foregoing policy during working hours to undergo at Company expense appropriate urinalysis, breath or other testing procedures to assist the Company in determining whether violation of the foregoing policy has occurred. Any employee who refuses a Company request to submit, or who fails to submit, to such testing procedures will be subject to discipline up to and including discharge.

On February 26, the Respondent discharged Mark Sessler because he refused to submit to a drug test in conjunction with medical treatment for a workplace accident. The next day Gamble and Union Representative Harry Hinsley met with Payne and Larry Johnson, the Respondent's human resource manager. The union representative protested the Respondent's right to fire Sessler for refusing to take a drug test. Larry Johnson mentioned the 1986 consent forms and Hinsley asked to see them. Johnson left the meeting and returned with the forms.

This was the first time that the Respondent referred to the applicant consent forms for drug testing that Sessler and Lattimer had signed in 1986. However, for almost the entire preceding 2 months, the Respondent had told the Union that its 1990 drug-testing policy applied to all employees without qualification. In discussing the Lattimer incident and the 1990 policy with the Union, and in the posted announcement of that policy, the Respondent made no distinction between employees who had signed the 1986 applicant consent forms and those who had not. In these circumstances, we find that Sessler's having signed the consent form has no bearing on his discharge. The Respondent subjected Lattimer, Sessler, and subsequently Shad Smith to its 1990 policy which both on its own terms and pursuant to the Respondent's admission, applied to all employees irrespective of whether they had signed the 1986 applicant consent forms. In *Johnson-Bateman Co.*, 295 NLRB 180 (1989), the Board found that postaccident drug testing of employees is a mandatory subject of bargaining. *Johnson-Bateman* applies here.

Unlike our dissenting colleague, we find nothing in the discussion between the parties prompted by the Lattimer and Sessler incidents to suggest that the Respondent was imposing two distinct policies at that time. Rather, a fair reading of all the evidence shows that on January 1 and February 12, 13, and 27, the Respondent was implementing a broad new drug policy which applied to *all* employees, irrespective of whether they had signed consent forms during the application process, and without conditioning that policy on any preexisting practice.

Further, even assuming for argument's sake a nexus between the Respondent's 1990 policy and the 1986 consent forms, we would reach the same result. We find, for the reasons given by the judge, that the 1986 consent forms signed by job applicants did not con-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

stitute a waiver by the Union of the right to bargain about drug testing of unit employees.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kysor/Cadillac, an Operating Division of Kysor Industrial Corporation, Cadillac, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, dissenting in part.

I dissent from my colleagues' conclusion that the Respondent violated the Act by requiring employees Sessler and Smith to take a drug test.

The evidence establishes that in 1986 the Respondent gave the Union a proposed employee consent form. The form, inter alia, required new employees to consent to a drug test in the event of a workplace accident. The Respondent said that it intended to implement the practice of using the form. The Union did not object. In my view, the Union acquiesced in the use of the form. Consistent with that, employees Sessler and Smith signed the consent forms. In February and May 1990, the Respondent required Sessler and Smith, respectively, to take a drug test after a workplace accident. They refused and were discharged.

Inasmuch as the Union acquiesced in the use of the consent form, and since employees Sessler and Smith signed the consent form, I believe that the Respondent could require them to take the drug test. Accordingly, the Respondent could discipline them for refusing to take that test.

My colleagues believe that Sessler and Smith were required to take a drug test pursuant to a policy announced on February 13, 1990. Under that policy, an employee could be tested *if the Company believed that the employee was using drugs or alcohol in the workplace or was working under their influence*. However, at an earlier time, on January 1, the Respondent instituted a policy of drug testing employees *who were being treated for an on-the-job injury*.[1] There is nothing to suggest that the February 13 policy was intended to supplant, i.e., eliminate, the January 1 policy. Hence, as of February 13, employees could be tested in either of two situations: (1) if the Company believed that they were using intoxicants at work or were under the influence of same; (2) if the employee was being treated for an on-the-job injury.

The evidence is clear that Sessler and Smith were being tested under (2) above. Indeed, the parties have stipulated that the tests were in conjunction with on-the-job injuries that each had sustained. Since the tests were required pursuant to the ''on-the-job injury'' policy, and since the Union and the employees had consented to such testing, I would not find a violation.

[2] We find it unnecessary to reach the Respondent's motion to strike misrepresentations of the record from the General Counsel's answering brief and the General Counsel's motion to strike the affidavit attached to the Respondent's brief. These motions involve the 1986 discussions between the Respondent and the Union.

[1] See JD sec. III,B, par. 6.

Joseph A. Barker, Esq., for the General Counsel.
Joseph F. Martin, Esq. and *Stephen B. Grow, Esq.*, of Grand Rapids, Michigan, for the Respondent.
Vern Brusseau, of Grand Rapids, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Cadillac, Michigan, on January 7, 1991. The charge and amended charges were filed respectively on March 1, April 9, and August 21, 1990, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 545 (UAW and Local 545, and collectively the Union).[1] The amended complaint, which issued on September 10 and was amended at the hearing, alleges that Kysor/Cadillac, an Operating Division of Kysor Industrial Corporation (the Company or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly unilaterally implemented a policy requiring certain bargaining unit employees to undergo drug and/or alcohol testing as a condition of employment, and pursuant to that policy discharged unit employees Mark Sessler and Shad Smith for their refusal to submit to such testing. The Company's answer denies the commission of the alleged unfair labor practices, and affirmatively alleges that claims relating to the propriety of the drug testing procedure pursuant to which Sessler and Smith were terminated are time-barred by Section 10(b) of the Act.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of the parties and brief submitted by the General Counsel, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a Michigan corporation with its principal office and place of business in Cadillac, Michigan, is engaged in the manufacture, sale, and distribution of truck radiators, temperature control systems, gauges, and related products. The Company's Cadillac plant is the only facility involved in this proceeding. In the operation of its business, the Company annually ships products valued in excess of $50,000 directly to points outside of Michigan. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates are for 1990 unless otherwise indicated.

[2] Certain errors in the transcript have been noted and corrected.

II. THE LABOR ORGANIZATION AND BARGAINING UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. At all times material, the Union has been and is the recognized and exclusive collective-bargaining representative of the Company's employees in the following appropriate unit:

> All production, maintenance and toolroom employees employed by the Company at its 1100 Wright Street, Cadillac, Michigan facility; but excluding all executives, watchmen, sweepers, office and clerical employees, guards and supervisors as defined in the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The most recent collective-bargaining contract covering the unit employees was effective by its terms from April 2, 1984, through January 23, 1987. Insofar as pertinent, the contract provided in sum that the Company could make and after publication enforce reasonable rules and regulations to maintain order, safety, and/or effective operation of the plant, but that the Union reserved the right to question the reasonableness of such rules and regulations through the grievance and arbitration procedure. The contract said nothing about drug or alcohol testing of employees. In October or November 1986 the Company instituted a practice of preemployment drug testing. In conjunction with that policy, all job applicants were required to sign a ''Blood/Urine Test Consent Form'' containing the following language:

> I understand that testing for drugs and/or alcohol through use of blood and/or urine tests is part of applicant screening for employment and that positive test results may result in my being rejected for employment, promotion, transfer or continued employment. I hereby consent to blood and/or urine testing as part of my preemployment physical examination and evaluation and understand that failure to give my consent will disqualify me from consideration for employment.
>
> I further understand that urine and/or blood testing may be required during my term of employment, if hired, as a condition of employment for valid reasons such as investigation of accidents or other employment related incidents, as well as for promotion, transfer and for continued employment. I hereby consent to blood and/or urine testing for drugs and/or alcohol in connection with these matters as an employee of a Kysor plant. I further understand that my failure to take these tests as required may result in my discharge.

Current employees were not asked to sign the form. Larry Johnson, the Company's human resources manager, who prepared the form, testified in sum as follows: In 1986 he discussed the form with then Union President Don Mitchell and then Union Chief Steward Harry Hinsley. Johnson said the Company decided to implement a procedure for drug testing employees, showed them the form and gave them a copy. He said that the form would be part of the job application process, and that all future hires would be drug tested. The union representatives made no response at this time. A few days later they returned with a prepared UAW statement consisting of an article from a UAW publication. The article stated in sum that the UAW did not condone drug usage or drugs in the workplace, but that the rights of employees should not be trampled on in the process of drug testing. Johnson explained that the Company was concerned about drug usage in the Cadillac community. He said the Company would implement the consent form. There was no further discussion of the matter. The Company proceeded to implement the form, and to drug test applicants, without any objection from the Union. In his investigatory affidavit to the Board, Johnson stated that in their first meeting he said the Company intended to implement the new form, they read it and took a copy, and this ''was the full extent of the discussion on the subject of the form or drug testing'' (referring to the first meeting). Harry Hinsley became union president in 1988. Hinsley testified that he did not recall any meeting in 1986 as described by Johnson, and that until Sessler's discharge in February 1990 he did not know of the existence of the consent forms. Michael Gamble was chief steward from 1988 to May 1990, when he became union president on Hinsley's retirement. Gamble testified that he knew since 1988 that the Company was using these forms. Johnson, Hinsley, and Gamble, who were called to testify by the General Counsel (Johnson as an adverse witness), were the only witnesses in this proceeding. Johnson and Hinsley each displayed a tendency to be forgetful, vague, evasive, or inconsistent concerning matters adverse to their respective cases. Hinsley and Gamble were already employed by the Company in 1986, and therefore were not asked to sign the consent form. If, as testified by Gamble he knew about the forms in 1988, then it is probable that Hinsley, his predecessor as chief steward, also knew about the forms. Hinsley did not deny meeting with Johnson in 1986, but simply testified that he did not recall the meetings. In light of Johnson's affidavit, I find that Johnson did not expressly tell the Union that future hires would be drug tested, although the form indicated this would be done. In all other respects I credit Johnson concerning his 1986 meetings with the Union.

The parties did not discuss drug testing in the 1987 contract negotiations, which did not result in agreement on a new contract. In the meantime, and until January 1990, the Company did not drug test employees after their hire. Johnson's testimony was vague, equivocal, inconsistent, and in some respects demonstrably incredible in this regard. Johnson initially testified that probably in November 1986 he instituted a practice of drug testing employees who had an on-the-job injury. Johnson subsequently testified that the Company implemented such testing some time after the summer of 1989. Johnson admitted that although some employees underwent drug rehabilitation during the period from 1986 to 1990, they were not required to submit to drug testing even after they returned to work. No evidence was adduced to show that prior to 1990, any employee was asked or instructed to submit to posthire drug testing. The evidence further indicates that until February 1990, the Company never informed the Union or the employees that it would institute a practice of drug testing employees under any circumstances, and never submitted any proposal to the Union in this regard. Johnson testified that he did not know whether or when he told the Union that there would be postinjury testing of employees. Johnson described such testing as an

''evolutionary process.'' So far as indicated by the present record, including Johnson's testimony, that process, until January 1990, consisted of the Company's own internal thought processes. Johnson testified that in the summer of 1989, after the Drug-Free Workplace Act became law, he discussed the possibility of postinjury testing with the Company's physician. The Company was not a government contractor, and therefore the Act did not apply to its plant. In July 1989 Plant Manager Larry Payne requested to meet with the Union concerning safety shoes. Toward the end of the meeting Payne distributed copies of a booklet entitled ''The Drug-Free Workplace.'' He said that ''in the near future we would be talking about this.'' He said nothing about drug testing, and the Company did not thereafter contact the Union about the matter.[3] The Company subsequently posted and distributed to its employees, copies of the booklet and a statement of company policy. However neither document set forth any policy or practice concerning drug testing of employees. The statement of policy asserted that each company division would develop its own plan to comply with the Drug-Free Workplace Act. The statement said nothing about drug testing. The booklet (an outside publication) was ambiguous. At one point the publication stated that: ''You have to abide by the rules of our Drug-Free Workplace. We can discharge you if you don't.'' At another point the booklet stated: ''The Drug-Free Workplace Act does not require drug testing. However certain government agencies do require that some organizations doing business with them conduct tests. If these rules affect us, or if we test for any other reason, you can be sure we'll tell you about it.''

In January 1990, without notice to the Union or the employees, the Company instituted a practice of drug testing employees who were treated for on-the-job injuries. On January 10 unit employee Kevin Lattimer was treated by the company physician for an industrial accident. Lattimer had signed a consent form. Pursuant to Johnson's instructions, Lattimer was given a drug test. Lattimer took the test, which he passed. He told then Chief Steward Gamble what happened. Gamble asked Plant Manager Payne why Lattimer had to take a drug test. Payne answered that it was company policy as of January 1, 1990. Gamble responded that he never heard of such a policy. On February 12, Gamble, Johnson, Payne, and the Company's attorney attended a forum at which the subject of drug testing was discussed. Gamble questioned how the Company could impose a drug policy without negotiating. Payne admitted that the Company did not post its drug-free workplace policy. The next day the Company posted a notice, dated February 8, announcing its ''drug-free workplace policy.'' The notice prohibited drugs or alcohol on company premises, or working under the influence of same. With regard to drug testing, the notice stated as follows:

> The Company reserves the right to require any employee who it believes to be in violation of the foregoing policy during working hours to undergo at Company expense appropriate urinalysis, breath or other testing procedures to assist the Company in determining whether violation of the foregoing policy has occurred. Any employee who refuses a Company request to submit, or who fails to submit, to such testing procedures will be subject to discipline up to and including discharge.

Human Relations Manager Johnson testified that the Company adopted this policy because employees hired before 1986 did not sign a consent form. The policy, on its face, would apply to all employees regardless of whether they signed a consent form.

On February 26, the Company discharged unit employee Mark Sessler, and on May 4 discharged unit employee Shad Smith. The parties stipulated that both employees were terminated for refusing to submit to a drug screening test in conjunction with medical treatment paid for by the Company and resulting from an on-the-job injury. Both employees signed consent forms when they were hired. Johnson testified that neither Sessler, Smith, nor any other employee was terminated pursuant to the policy announced in February 1990. Rather, Johnson testified that the basis for discharging Sessler and Smith was that they signed consent forms when they were hired, pursuant to the practice initiated by the Company in 1986. The Union protested Sessler's discharge, and the parties (Hinsley, Gamble, Johnson, and Payne) met to discuss the discharge. Johnson testified in sum as follows: The Union protested Sessler's discharge pursuant to the policy of testing employees after an on-the-job injury. Johnson answered that they negotiated in 1986, and referred to the consent procedure. Hinsley replied that that was conversation or discussion, not negotiation. Gamble testified that Johnson said they negotiated in July 1989, whereupon Hinsley responded that those were discussions, not negotiations, and there was no mention of 1986 at this time. However, Johnson later said that the Company based the discharge on the fact that Sessler signed a consent form. Hinsley testified in sum as follows: He did not recall whether Johnson referred to negotiations or 1986 meetings. Hinsley said he would not take a drug test. Johnson mentioned the consent forms, and brought in a folder with the forms and the booklet ''The Drug-Free Workplace.'' Hinsley initially testified that the forms were signed, but subsequently testified that they were not. I find that Johnson said that the parties negotiated in July 1989. If Johnson referred to negotiations in 1986, this would have been tantamount to an admission that the Company unilaterally implemented a new policy in 1990 which applied to employees who had not signed consent forms. However in light of Hinsley's admissions, I find that Johnson also relied on the fact that Sessler signed a consent form.

The Union protested the policy announced in February 1990. In September and October 1990, the Company and the Union negotiated a drug-free workplace policy, and agreed that the Company could implement that policy without objection from the Union. With regard to testing, the policy provided that current employees were subject to drug or alcohol testing, and discharge for refusal to submit to such testing, ''where the Company has reasonable cause to believe the employee is violating [the drug-free workplace] policy, or where the testing is otherwise required by law.'' The policy became effective in November 1990. As the policy was not

[3] I credit Gamble's testimony concerning this meeting. Gamble generally impressed me as a more credible witness than Johnson or Hinsley. His testimony concerning statements by Plant Manager Payne was uncontradicted. Except as otherwise indicated, I have credited his testimony concerning this and other matters.

made retroactive, it did not apply to the terminations of Sessler and Smith.

B. *Analysis and Concluding Findings*

I find, as alleged in the complaint, that the Company violated Section 8(a)(5) and (1) of the Act. In January 1990 the Company, without notice to or offering the Union an opportunity to bargain, unilaterally implemented a practice, as a condition of employment, of requiring employees injured in an industrial accident to submit to a drug test, or at least those employees who signed consent forms when they were hired. Prior to January 1990 the Company did not have such a practice. Rather the Company used such tests only as part of applicant screening for employment. Indeed the Company concedes (Br. 10) that following consultations between Johnson and the Company's physician, the Company decided ''to uniformly test post-1986 hires following industrial accidents.'' The Company conceded in January 1990 that this was a new policy. When Gamble asked Plant Manager Payne why employee Lattimer (who had signed a consent form) was required to take a drug test, Payne answered that it was company policy as of January 1, 1990.

Drug/alcohol testing of unit employees is a term of condition of employment, and ''a newly imposed requirement of [such] testing for employees who require medical treatment for work injuries is a mandatory subject of bargaining.'' Therefore an employer violates Section 8(a)(5) and (1) by unilaterally implementing such a requirement without providing the bargaining representative prior notice and an opportunity to bargain. *Johnson-Bateman Co*., 295 NLRB 180 (1989). Moreover, a union's ''acquiescence in the drug/alcohol testing requirement for new employees at the time of hiring does not constitute a waiver of its right to bargain about drug/alcohol testing of injured employees.'' Id. Nevertheless the Company contends that it was privileged to unilaterally drug test employees, and to discharge Sessler and Smith for refusing to submit to such testing, because in 1986 the Union acquiesced in the consent form procedure. The contention is erroneous. ''Applicants for employment are not 'employees' within the meaning of the collective-bargaining obligations of the Act.'' *Star Tribune*, 295 NLRB 543, 546 (1989). Absent unusual circumstances not here present, the job application process is not a mandatory subject of bargaining, and therefore the employer has no obligation to bargain with the Union concerning that process, except insofar as that process ''vitally affects'' the terms and conditions of employment of unit employees. Id., citing *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 159 (1971). In *Star Tribune*, the Board indicated certain areas of the hiring process which give rise to a bargaining obligation. The elimination of actual or suspected discrimination in hiring practices is a mandatory subject of bargaining, because of the high national priority given to the elimination of such discrimination, and the importance of unions' role in achieving that result. Id. The Board also distinguished hiring hall cases involving intermittent employment, because in such cases ''the essence of employee security therein rest[s] on the establishment of seniority rights through a common source of job priority and priority standards.'' Id., citing *Houston Chapter, AGC*, 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5th Cir. 1965). However, the Board made clear that the contents of job application forms ordinarily are not a mandatory subject of bargaining, even insofar as those forms contain commitments which on their face pertain to terms and conditions of employment. The Board, at fn. 6, referred to *Laney & Duke Storage Warehouse Co*., 151 NLRB 248 (1965), enfd. in relevant part, 369 F.2d 859 (5th Cir. 1966). In *Laney & Duke*, the employer unilaterally required current employees to complete and sign new, revised job application forms. These forms, among other things, required the employees to agree to submit to mental examinations or polygraph tests, to serve a 6-month probationary period, and to accept limited recall rights if laid off. The Board held that the employer had a duty to bargain with the representative of its employees about the changed application forms, which included changes in terms and conditions of employment of unit employees. However, in *Star Tribune* the Board held: ''To the extent that the 8(a)(5) violation is premised on a duty to bargain about applicants, *Laney & Duke* is overruled.'' In sum, the Board in *Star Tribune* held that *Laney & Duke* involved a bargaining obligation because current employees were required to make commitments concerning terms and conditions of employment, but there would be no obligation if the forms were presented only to job applicants.

In light of *Star Tribune*, it is evident and I so find that under Board law, the Company had no obligation to bargain with the Union before instituting the consent form procedure. That procedure would not vitally affect the terms and conditions of unit employees, and become a mandatory subject of bargaining, unless and until the Company instituted or informed the Union that it sought to institute a practice of drug testing employees. As the consent forms were not a mandatory subject of bargaining, and the Union had no knowledge that the Company made drug testing a condition of employment of current employees until the events which gave rise to this proceeding, it follows that the Union could not have waived its rights in this regard.[4] It further follows that the consent forms, signed by individuals who were not yet unit employees, and certainly not union representatives, could not operate as a waiver or other bar to the Union's bargaining rights. To hold otherwise would in effect open a large loophole in Section 8(a)(5) by permitting the employer to unilat-

[4] The Company's reliance on *Reynolds Electrical & Engineering Co*., 125 LRRM 1368 (1987), a General Counsel Advice memorandum, is misplaced. In that case General Counsel declined to issue a complaint, concluding that the employer did not violate Sec. 8(a)(5) by unilaterally requiring employees and job applicants to submit to drug/alcohol testing, because the Union therein waived its right to bargain by agreeing to a contract which gave the employer the right to require employees and applicants to take periodic physical examinations. First, advice memoranda do not constitute Board law. Second, unlike *Reynolds*, the Union here never agreed to a broad management-rights clause which expressly or impliedly permitted the Company to unilaterally implement drug testing of employees. Rather as indicated, the expired collective-bargaining contract (the terms of which remain in effect until changed through the bargaining process), required the Company to publish ''reasonable'' rules and regulations to maintain order, safety, and/or effective operation of the plant, and to afford the Union an opportunity to question the reasonableness of such rules and regulations. Third, and most significantly, at the time of this memorandum the General Counsel was taking the position that drug testing of applicants was a mandatory subject of bargaining. The Board rejected that position in *Star Tribune*. Therefore the memorandum was based on a premise contrary to Board law.

erally control terms and conditions of employment through commitments imposed on job applicants. *Laney & Duke*, supra, illustrates the potential scope of such commitments.

In sum, in January 1990 the Company, unilaterally and without prior notice to or affording the Union an opportunity to bargain, implemented a policy and practice of requiring unit employees, or those who signed consent forms, to submit to drug screening tests in conjunction with medical treatment for on-the-job injuries, as a condition of employment. The Company thereby violated Section 8(a)(5) and (1) of the Act. *Johnson-Bateman Co*., supra. Pursuant to such policy and practice, the Company discharged employees Mark Sessler and Shad Smith for refusing to submit to such testing. The Company thereby further violated Section 8(a)(5) and (1), and Sessler and Smith are entitled to the usual remedies of reinstatement with backpay. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215–217 (1964); *Sandpiper Convalescent Center*, 279 NLRB 1129, 1134 (1986), enfd. 824 F.2d 318, 324 (4th Cir. 1987); and *Boland Marine Mfg. Co*., 225 NLRB 824 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977); cited with approval in *Taracorp Industries*, 273 NLRB 221, 222 fn. 10 (1984).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, maintenance, and toolroom employees employed by the Company at its 1100 Wright Street, Cadillac, Michigan facility; but excluding all executives, watchmen, sweepers, office and clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By unilaterally implementing a policy and practice of requiring certain unit employees to undergo drug testing as a condition of employment, without prior notice to or affording the Union an opportunity to bargain concerning such practice, and by discharging Mark Sessler and Shad Smith pursuant to such policy and practice, the Company has engaged, and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act. As the Company and the Union eventually negotiated and agreed on a drug-free workplace policy, including provision for drug or alcohol testing of employees under certain conditions, I do not believe that the circumstances of this case warrant an affirmative order directing the Company to rescind its former policy (which has been superceded by the new policy) or to bargain with the Union concerning the matter of drug/alcohol testing (which it has done). See *General Electric Co*., 150 NLRB 192, 285 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965. However, I shall recommend that the Company be ordered to offer Mark Sessler and Shad Smith immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits that they may have suffered from the time of their termination to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to expunge from its records any reference to the unlawful terminations of Sessler and Smith, to give written notice of such expunction to each of them, and to inform each of them that its unlawful conduct will not be used as a basis for further personnel actions against them. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Kysor/Cadillac, an Operating Division of Kysor Industrial Corporation, Cadillac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain collectively in good faith with the Union as the exclusive representative of all its employees in the above-described appropriate unit, by unilaterally changing terms and conditions of employment of unit employees without affording the Union prior notice and an opportunity to negotiate and bargain concerning such changes as the representative.

(b) Terminating employees pursuant to such unilateral changes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Mark Sessler and Shad Smith immediate and full reinstatement to their former jobs or, if such jobs no longer

[5] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of their terminations as set forth in the remedy section of this decision.

(b) Remove from their files any reference to the discharges of Mark Sessler and Shad Smith, and notify each of them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Cadillac, Michigan office and place of business copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 545, as the exclusive representative of all our employees in the appropriate unit by unilaterally changing terms and conditions of employment of unit employees without affording that Union prior notice and an opportunity to negotiate and bargain concerning such changes as the representative. The appropriate unit is:

> All production, maintenance and toolroom employees employed by us at our 1100 Wright Street, Cadillac, Michigan facility; but excluding all executives, watchmen, sweepers, office and clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT terminate employees pursuant to such unilateral changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Mark Sessler and Shad Smith immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of their terminations.

WE WILL remove from our files any reference to the discharges of Mark Sessler and Shad Smith, and notify them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against them.

KYSOR/CADILLAC, AN OPERATING DIVISION OF KYSOR INDUSTRIAL CORPORATION